Supreme Court of the United States

October Term, 1973

No. 73-5419

DAISY FLEMMING,

Petitioner,

—v.—

CLINCHFIELD RAILROAD COMPANY,

Respondent.

ON MOTION TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

DAVID G. LUBEN
1920 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorney for Respondent

Of Counsel:

FERDINAND POWELL, JR.
Johnson City, Tennessee

HARRY W. LAWRENCE
Erwin, Tennessee

ARNOLD & PORTER
Washington, D. C.

October, 1973

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JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1972, and a timely petition for rehearing was denied on June 20, 1972. The motion to proceed *in forma pauperis* and petition for certiorari were filed September 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded upon the record in this diversity personal injury case that proximate contributory negligence, as defined in the laws of Tennessee, was present as a matter of law.

STATEMENT

This was a suit for personal injuries by a pedestrian, Flinchum, against respondent Clinchfield Railroad Company arising out of a grade crossing accident. The suit was commenced by Flinchum in a Tennessee state court but removed by Clinchfield to the United States District Court for the Eastern District of Tennessee. (Jt. App. 1)[1] A first trial resulted in a verdict for plaintiff but the District Court granted a new trial on the basis of an error in its own charge to the jury. (Jt. App. 3-4)

The evidence at the second trial showed that Flinchum was walking after dark in Johnson City, Tennessee, and approaching a grade crossing across Buffalo Street. (Jt. App. 14-15, 19-21, 25-27) Flinchum's own testimony was to the effect that prior to crossing the tracks at the grade crossing, he saw the headlights of a train approaching in his direction at a speed of 50 to 55 miles an hour at a distance of 25 to 30 feet from him, by his estimate. His own testimony was that he tried "to beat it [the train] across the grade crossing." (Jt. App. 29) He testified that he made it across the first set of tracks of the two-track grade crossing only to find that the train was on the second set of tracks. (Jt. App. 23-24, 30) His testimony was that at this time the train was about 10 or 15 feet from him; he tried to reverse his direction, stumbled, fell and was run over by the locomotive. (Jt. App. 23-25, 30)

An expert train man called as a witness by Flinchum testified that the train consisted of 107 cars and was over a mile in length, and that the train could not have been stopped in less than 200 feet even if it had been going as

[1] We so refer to the Joint Appendix in the Court of Appeals.

slow as ten miles an hour (Jt. App. 51-52, 56-57); as noted, its speed was in fact much higher. There was no conflicting evidence as to the space which it would take to stop the train.

Clinchfield duly moved for a directed verdict and, following a verdict for plaintiff, moved for judgment n.o.v. or for a new trial. (Jt. App. 5-6, 60-65, 96, 99-102) The motions were overruled by the District Court. (Jt. App. 5-6, 65, 96, 103-08) On appeal to the Court of Appeals for the Sixth Circuit, the court reversed the judgment and held that it was an error not to have granted Clinchfield's motions for a directed verdict and for judgment n.o.v.

The Court of Appeals pointed out that: "In this diversity action, Tennessee law controls as to resolution of all substantive issues and we are required to consider the evidence in the light most favorable to plaintiff." (Pet., p. 20) The Court of Appeals characterized the sole question before it as "whether the facts herein show proximate contributory negligence as a matter of law, which in Tennessee is a complete bar both to a common law cause of action based on negligence and to a negligence action under the provisions of the Tennessee Statutory Precautions Act. . . ." (Pet., pp. 20-21) The Court of Appeals held that Flinchum's behavior showed a "complete disregard for his own safety." (Pet., p. 21) It held him guilty of proximate contributory negligence as a matter of law. (Pet., pp. 21-22)

As to the contentions of Flinchum that the train failed to give any warning of its approach (through a bell or whistle) and failed to keep a proper lookout, the Court of Appeals held that even if the jury credited these contentions "the railroad could not be held liable. A warning

would only have told Flinchum what he already knew. Moreover, it is clear that a moving train cannot stop in time to avoid hitting an obstruction cast so suddenly in its path." (Pet., p. 22)

ARGUMENT

The decision of the Court of Appeals in this diversity personal injury case is clearly correct and presents no occasion for the grant of certiorari. The Court of Appeals applied the substantive law of Tennessee to this action as obviously it should have. Since the 1959 amendment to the Statutory Precautions Act of Tennessee, proximate contributory negligence of the plaintiff in a railroad right-of-way accident case is a complete bar to an action for personal injuries, whether based on common-law negligence by the defendant railroad or on the theory of violation of one of the substantive provisions of the Statutory Precautions Act. See *Maxwell* v. *Western-Atlanta R. Co.*, 295 F. Supp. 740, 745 (E.D. Tenn. 1967), *aff'd*, 406 F.2d 1326 (6th Cir. 1969); *Union R. Co.* v. *Jinks*, 55 Tenn. App. 491, 402 S.W.2d 495 (1965); Tenn. Code Ann. §65-1209. While Tennessee also recognizes a kind of contributory negligence called "remote contributory negligence," the presence of which only goes to mitigate damages (see *McCullough* v. *Johnson Freight Lines, Inc.*, 308 S.W.2d 387, 392 (Tenn. 1957)), the Tennessee law is clear that the existence of "proximate contributory negligence" which directly causes an accident is a bar to recovery. See *Maxwell* v. *Western-Atlanta R. Co., supra; Union R. Co.* v. *Jinks, supra.*

The Court of Appeals correctly characterized the question before it here as "whether the facts herein show proximate contributory negligence as a matter of law." (Pet.,

p. 20) The Court of Appeals drew the obvious conclusion on this state of the record that as a matter of law, Flinchum's "complete disregard for his own safety" "was the proximate cause of the injuries which are the subject of this action." (Pet., pp. 21, 22)

Flinchum contends that the action of the Court of Appeals was a violation of the Seventh Amendment in that allegedly the Court of Appeals substituted its judgment for that of the jury. But it is Hornbook law that where only one conclusion may be drawn from a set of facts and there is no evidence to support the other conclusion, the action of an appellate court in the Federal system in setting aside a contrary jury verdict does not violate the Seventh Amendment. See, *e.g., United States* v. *Generes,* 405 U.S. 93, 106 (1972); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317 (1967); *Gunning* v. *Cooley,* 281 U.S. 90 (1930). Accordingly, in the Federal courts, as is the case in the courts of Tennessee (see *Union R. Co.* v. *Jinks, supra*), an appellate court may conclude that proximate contributory negligence, rather than remote contributory negligence under Tennessee law, is manifest on the record as a matter of law, and may set aside a jury verdict to the contrary and order the entry of judgment n.o.v. *Cf. Maxwell* v. *Western-Atlanta R. Co., supra.*

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
Attorney for Respondent

Of Counsel:

FERDINAND POWELL, JR.
Johnson City, Tennessee

HARRY W. LAWRENCE
Erwin, Tennessee

ARNOLD & PORTER
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